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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-293

JERRY YONO,
Petitioner,
v.
COLUMBUS LANDINGS, LTD.,
Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I

WAS THE DISTRICT COURT'S OPINION BASED ON SUPPORTED FINDINGS OF FACT, CONCLUSIONS OF MICHIGAN LAW, AND ARE THERE NO "SPECIAL OR IMPORTANT REASONS" WHY THIS HONORABLE COURT SHOULD REVIEW THE MATTER FURTHER?

II

DID THE DISTRICT COURT CORRECTLY DETERMINE IN LIGHT OF THE OPERANT AND EXISTENT FACTS THAT THE TERM "ALL ROADS" WAS AMBIGUOUS AND IN NEED OF JUDICIAL INTERPRETATION AND CONSTRUCTION?

III

ASSUMING ARGUENDO THAT "ALL ROADS" MEANT EVERY ROAD AND NOT JUST ACCESS ROADS, DID THE EVIDENCE ADDUCED AT TRIAL SUPPORT THE DISTRICT COURT'S DECISION THAT RESPONDENT SUBSTANTIALLY PERFORMED THE CONTRACT PROVISIONS REQUIRING COMPLETION OF SUCH ROADS WITHIN THREE YEARS?

IV

DID THE DISTRICT COURT ERR IN FINDING NO MATERIAL MISREPRESENTATION BY RESPONDENT WITH REGARD TO THE VALUE OF PROPERTY, DEVELOPMENT AND CONSTRUCTION OF ROADS ON THE ISLAND?

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COUNTER STATEMENT OF THE CASE

On or about May 25, 1970, Petitioner, Jerry Yono, entered into a contract for the purchase of land on the island of San Salvador, Bahamas, with Respondent, Columbus Landings, Ltd., a development corporation. Petitioner visited the island, saw all prepared plat maps (TR 50, 51) and received brochures describing the entire island prior to signing the purchase agreement.

Petitioner was approached in 1970 by John Wilt of Wilt International, the Michigan real estate broker for Columbus Landings Company, the sales arm of Columbus Landings, Ltd., a subsidiary of Investment Corporation of Florida (TR 68-70), who along with Sherwood Faubel, of Columbus Landings Company, negotiated the sale of Petitioner's property.

At the time of the purchase, in order to secure to himself the greatest investment protection, Petitioner agreed to purchase $100,000.00 worth of land in Columbus Landings I in order to establish himself in the priority system for a hotel site in a future subdivision, as yet undeveloped, since no hotel sites were then available. As further protection, Petitioner insisted on an addendum to the purchase agreement, which had specified in paragraph 8 that:

> The seller agrees to construct *water bonded, graded rock roads* throughout the Columbus Landings Subdivision shown on the plat and further guarantees that each lot covered by this agreement will have full frontage on such a road, accessible by automobile, before the expiration of the contract maturity period. (Emphasis added)

The addendum, drafted by Petitioner and agreed to by Respondent provided that:

> It is fully understood by the buyer that all roads must be completed with a maximum time limit of three (3) years.

On August 25, 1970, an amendment to the purchase agreement was executed changing Petitioner's property description to other land in Subdivision I (TR 32) and

again on July 8, 1971, changing Petitioner's property description to his specified hotel site in Subdivision III. (TR 33) Both changes were made with the full knowledge and consent of Petitioner.

Prior to cessation of payments, Petitioner traveled to the island on several occasions. (TR 50, 56, 57) Petitioner made timely payments of Sixty-Nine Thousand Two Hundred Fifty ($69,250.00) Dollars until July, 1974. (TR 61) Petitioner alleges he ceased payments due to Respondent's failure to complete "all roads" within the prescribed time period and because of a general lack of activity and development on the island. Petitioner cites an August 27, 1974 letter from Respondent referring to road construction contracts in Subdivision II, III, IV (TR 38, 39) as his justification for default.

At trial, Mrs. James Nall testified for Respondent that in 1970 a main access highway named Queen's Highway existed encircling the island. He further testified that by March of 1972 the main arterial highway to Subdivision III, Discovery Bay Blvd. was complete (TR 82), and that by March 31, 1972, substantially all the *graded rock roads* in Subdivision II, III, and IV were completed. (TR 83) He testified that these roads had to be completed prior to permission for land sales in New York State and that such permission was granted on March 31, 1972. (TR 83) He also testified that New York State was among those which inspected the property. (TR 80)

Contrary to Petitioner's contention, Mr. Nall testified that Columbus Landings itself had undertaken development including remodeling the Inn on the island in 1972-1973 (TR 89) and furthering its marina plans.

None of Respondent's testimony was controverted by Petitioner. Further, Petitioner failed at any time to introduce any evidence of injury to his investment. Development of the island continues at this time.

Petitioner brought suit in Federal District Court seeking rescission of his contract. On May 17, 1977, a bench trial was held before the Honorable Fred W. Kaess, District Judge, United States District Court, Eastern District of Michigan. After taking all testimony and reviewing all documentary evidence, pertinent sections of which have been cited, the Court entered a Judgment for Respondent, for No Cause of Action and granted Respondent attorney fees and costs. Petitioner appealed as of right to the Court of Appeals for the Sixth Circuit. On July 23, 1979, in a per curiam opinion, the Circuit Court of Appeals affirmed the District Court decision.

ARGUMENT

I

THE DISTRICT COURT'S OPINION WAS BASED ON THAT COURT'S FINDING OF FACT, CORRECT CONCLUSIONS OF MICHIGAN LAW, AND THERE ARE NO "SPECIAL OR IMPORTANT REASONS" WHY THIS HONORABLE COURT SHOULD REVIEW THE MATTER FURTHER.

Petitioner's request for Writ of Certiorari avoids showing how this cause meets the criteria necessary for review by this Honorable Court. While this case is properly cognizable by this Honorable Court under 28 U.S.C. 1254 (1), Respondent urges that Petitioner's request fails to meet the criteria as set forth in

28 U.S.C., Rule 19, which says in part:

> A review on Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.

However vigorously pursued, Petitioner's cause of action was and is, mundanely, one for rescission for alleged breach of contract.

At trial, the District Court Judge heard and weighed testimony, applied Michigan law correctly, and concluded from the facts as he heard them and the law, that Petitioner was not entitled to rescission. Upon review, the Court of Appeals agreed.

Petitioner has not set forth "special and important reasons" for review by this Court because there are none.

II

THE DISTRICT COURT CORRECTLY DETERMINED THAT IN LIGHT OF THE OPERANT AND EXISTENT FACTS THE TERM "ALL ROADS" WAS AMBIGUOUS AND REQUIRED JUDICIAL INTERPRETATION AND CONSTRUCTION.

The trial court was correct in its determination that in light of the operant and existing facts the term "all roads" was ambiguous and required judicial interpretation. The controversy at bar centers on the meaning of two contract provisions.

Paragraph eight was an integral part of the standard pre-printed contract and provided in pertinent part:

> "The Seller agrees to construct water bonded, graded rock roads throughout the Columbus Landings Subdivision shown on the plat and further guarantees that each lot covered by this Agreement will have full frontage on such a road, accessible by automobile, before the expiration of the contract maturity period."

An addendum drafted by Petitioner's attorney was added at Petitioner's request which provided in pertinent part:

> "1. It is fully understood by the buyer that all roads must be completed within a maximum time limit of three (3) years."

On its face the term "all roads" appears clear; however, the trial court correctly applied Michigan law and held it ambiguous, necessitating judicial interpretation because of the facts and circumstances surrounding its usage as elicited at trial.

It is uncontroverted that the initial contract and addendum were executed with the mutual understanding that Petitioner intended to exchange the original lots selected for a hotel site. He purchased the original lots solely to gain a priority in the selection of a hotel site when projected hotel sites were platted and available for purchase.

Clearly he was aware that the other subdivisions were still incomplete and being planned. In fact, two exchanges of property were effected and more than thirteen months passed before he actually received a hotel site.

Generally, unambiguous language must be held to express the parties' intent *Ginsberg v Reliable Linen Service*, 292 Mich 70, 290 NW 331 (1940); however, a contract must also be construed to effectuate the intent of the parties when it was made.

> "In deciding a case involving a contract dispute, the *primary* role of the court is to ascertain the *intent* of the parties." (Emphasis supplied) *Henry v J. B. Publishing Co.*, 54 Mich App 409, 411, 221 NW 2d 174, 175 (1974).

To ascertain the intent of the parties, a contract should be construed in accordance with the circumstances existing at the time it was made. *Pekar v Local Union No. 181, International Union of United Brewery, etc.*, WKRS, 311 F 2d 618 (C.A. 6. 1962). *Sobczak v Kotwicki*, 347 Mich 242, 79 NW 2d 471 (1958). *Switzer v Pinconning Mfg. Co.*, 59 Mich 488, 26 NW 762 (1886).

The trial court in its decision considered the testimony as to the circumstances existing at the time the contract at issue was made. At that time, the only roads platted were in Columbus Landings No. 1. (TR 67) Columbus Landings No. 1 was part of a then planned four-subdivision development, which totaled over 2,000 acres. The purchase agreement used was a standard form. The court properly considered these circumstances in determining the meaning of the contract provisions in accordance with the applicable law. *Pekar, et al., supra*.

Furthermore, the court found it:

> . . . highly unlikely that a developer, at that time selling property only in a single subdivision, would intend to agree that the other three subdivisions still in the planning stage would

> have *all* roads completed within a three-year period. (Petitioner's Supplemental Appendix Page 5)

Clearly the trial court had good reason to rule that "all roads" required interpretation.

The addendum was added because Petitioner wanted to insure that *access* to his property would be available prior to the time specified in paragraph eight. (TR 24) By March 31, 1972, less than two years after the original contract was signed, not only the main access highway encircling the island was complete, but also all roads in Subdivision I (TR 92), and the main arterial highway to Subdivision II and substantially all the *graded rock roads* in Subdivisions II, III and IV were completed. (TR 82-86 + 100)

Furthermore, it was the uncontroverted testimony of James Nall that the plats are constantly undergoing change, that a subdivision is a living, breathing thing, "you design it today and it changes tomorrow morning." (TR 110) In regard to Columbus Landings III he also testified:

> Columbus Landings Three is like any other subdivision. It's a growing, expanding piece of real estate, and I have just added a new section to it here, and road work is going on there right now, sections that are not shown on this plat, and there were roads shown on this one that were not shown on the one that Mr. Yono saw in 1971. (TR 109)

Under these circumstances it would be unreasonable and even impossible for Respondent to agree to construct *all roads* as is Respondent's contention. Clearly Petitioner, as a sophisticated buyer knew this.

In view of these facts and circumstances, the trial court had good reason to rule that:

> . . . both parties understood that these phrases meant that all access roads to the property in question would be completed within the required time period. Further, this interpretation is consistent with the testimony of plaintiff during the course of the trial.

The trial court's decision and interpretation was proper in accordance with operant fact and applicable law and should not be disturbed.

III

ASSUMING ARGUENDO THAT "ALL ROADS" MEANT EVERY ROAD AND NOT JUST ACCESS ROADS, THE EVIDENCE ADDUCED AT TRIAL SUPPORTS THE DISTRICT COURT'S DECISION THAT RESPONDENT SUBSTANTIALLY PERFORMED THE CONTRACT PROVISIONS REQUIRING COMPLETION OF SUCH ROADS WITHIN THREE YEARS.

The trial court's determination that even if the term "all roads" was construed to mean every road, that Respondent had substantially complied with the contract requirements is supported by the evidence and applicable Michigan law.

The standard adopted and applied by the trial court was enunciated by the Michigan Supreme Court in *Walker & Co. v Harrison*, 347 Mich 630 (1957) adopting Section 275 of the *Restatement of Contracts* (1933):

"In determining the materiality of a failure fully to perform a promise the following circumstances are influential:

(a) The extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated;

(b) The extent to which the injured party may be adequately compensated in damages for lack of complete performance;

(c) The extent to which the party failing to perform has already partly performed or made preparations for performance;

(d) The greater or less hardship on the party failing to perform in terminating the contract;

(e) The wilful, negligent or innocent behavior of the party failing to perform;

(f) The greater or less uncertainty that the party failing to perform will perform the remainder of the contract."

To date, *Walker, supra,* has not been overruled, nor have Michigan courts adopted the tentative draft of *Restatements 2d, Contracts*.

There was uncontroverted testimony that by March 31, 1972, less than two years after the original contract was signed, not only the main access highway encircling the island was complete, but also all roads in Subdivision I were completed by September, 1971 (TR 92), the main arterial highway to Subdivision III and substantially all the *graded rock roads* in Subdivision II, III and IV were completed. (TR 82, 86, 100) Furthermore, the black topping required, but not

essential for use of roads had been completed in several areas by 1976. (TR 101)

This evidence and testimony clearly and unequivocally refutes Petitioner's bald assertions and representations that "neither the promised road construction or island development have *yet* occurred." (Petitioner's Petition Page 15) Conversely, many roads had been constructed well before the expiration of three years.

Furthermore, as previously discussed the development of the property was continually undergoing revision and still is. Mr. Nall's testimony as previously set forth indicates that until all the property is sold changes continually will have to be made in minor roads. (TR 109, 102) Under these circumstances Petitioner received the substantial benefit which he reasonably anticipated.

Even assuming the roads were not substantially completed the trial court's decision is correct because the record is void of any testimony establishing the elements required to demonstrate a material breach under any test.

There is no testimony demonstrating damage to Petitioner. The only witnesses examined were Petitioner and Respondent's President. Petitioner was not qualified as an expert in land appraisal and even if he had been did not testify concerning how he had been damaged, the extent of the damage or the value of the non-existent damage. In fact, Petitioner failed to present any competent evidence on any point set forth in either Restatement.

Petitioner has erroneously relied on *Brown v Gibratar Land Co.*, 249 Mich 662, 229 NW 604 (1930) on appeal both to the Sixth Circuit Court of Appeals and in his Petition before this Honorable Court. The only similarities in the two cases are that they both involved the sale of land and agreements to construct improvements subsequent to the sale. The distinction is that *Brown* involved a substantial breach amounting to fraud. Clearly the record in the case at bar is void of even a scintilla of fraud.

Respondent has a large investment in its San Salvador development. The evidence is uncontroverted that development continued unabated from 1970 to 1977, notwithstanding a sales depression in 1974. In fact, in 1974, prior to Petitioner's rejection of the contract, Respondent borrowed additional funds to continue developments and improvements. (TR 106, 107)

Accordingly, Respondent contends that even if the trial court erred in determining that "all roads" meant access roads thereby requiring Respondent to complete all roads, Respondent has substantially complied with its commitments. Respondent therefore contends that the trial court correctly ruled that even if the contract required Respondent to construct every road, substantial compliance had been achieved.

Furthermore, an examination of the transcript and exhibits convincingly demonstrates that the trial court accurately recalled Petitioner's evidence in his opinion:

> At no time has he notified defendant that he wished to build on the property which he selected. It does not appear that he has any such plans in the foreseeable future. Plaintiff has introduced no evidence that the value of the property has diminished since its purchase in 1969. Nor was there any testimony to the effect that plaintiff would no longer be able to obtain substantial benefit, which he could have reasonably anticipated from the contract, because of the failure.

In view of the affirmative testimony produced by the Respondent and Petitioner's failure to even specifically meet the elements for finding a material breach of contract, Respondent urges that the decisions of the trial and appellate courts be affirmed.

IV

THE DISTRICT COURT DID NOT ERR IN FINDING NO MATERIAL MISREPRESENTATION BY RESPONDENT WITH REGARD TO THE VALUE OF PROPERTY, DEVELOPMENT, AND CONSTRUCTION OF ROADS ON THE ISLAND.

To prove reversible error, Petitioner must show the District Court's judgment to be clearly erroneous by virtue of (a) insufficient evidence upon which to reach its conclusions or (b) failure to correctly apply Michigan law to the facts as presented at trial. Respondent contends Petitioner has shown neither.

During trial, extensive testimony was taken of both plaintiff and defendant in plaintiff's attempt to prove fraudulent misrepresentation. Plaintiff testified that defendant's agents told him the island in question would be "a gold mine within a year or two" and that he would be able to sell his property for "a heck of a lot more" than he paid. (TR 8, 15, 23) He also testified,

however, that he had engaged in business for over 20 years and that during the course of that business he had bought and sold real estate (grocery stores) on several occasions. (TR 5, 6) Plaintiff also testified he was told negotiations *were proceeding* with "a couple of hotel chains" and he felt "that if the chains were going there, that there wouldn't be any problem for me to go in there and put up the hotel." (TR 47) He never was told that a contract had been reached with any hotel chain and he did not so testify. Plaintiff also testified that he made several trips to the island, including one prior to any land purchase and one at least one and one-half years prior to his cessation of payments. (TR 51, 56, 61) At all times there was a road around the island, although plaintiff on one occasion reached his property (bounded on two sides by the ocean at his own specification) by boat. (TR 56)

The lack of support for plaintiff's contentions of misrepresentation were clearly demonstrated by defendant's testimony. James Nall, president of Investment Corporation of Florida, the effective owner of Columbus Landings, Ltd., testified on behalf of defendant. Defendant's testimony regarding construction of "all roads", and principally all roads in Sub. #3 where plaintiff's property was located, clearly exposed the lack of basis for plaintiff's complaint. According to defendant, the main arterial road in Sub. #3, Discovery Bay Blvd. as distinguished from the Queen's Highway surrounding the island, was completed in early 1972. All other roads in Sub. #3 which appeared on the plat as plaintiff saw it were substantially completed at the same time. Defendant was able to pinpoint the time factor since sales in New York State could not begin until completion of those

roads, and sales began in New York in 1972. Therefore, Petitioner's condition was effectively and substantially met prior to the expiration of the term called for by the contract addendum. (TR 82, 88) Judge Keith in his dissenting opinion in the Circuit Court of Appeals said that the condition had not been met because the only road constructed was the single access road around the island. After examination of the transcript, it is apparent that Judge Keith misread the uncontroverted testimony of defendant and failed to distinguish between the Queen's Highway and Discovery Bay Blvd.

As for Petitioner's claim that Respondent's agents misrepresented the island as a potential "gold mine," the trial judge was clearly within the realm of reason in determining these remarks to be "puffing." The statements made were done so by salesmen, a fact known to Petitioner. It is a salesman's job to sell his product, in this case, land. The idea that a salesman's estimate of *potential* value of property could seriously be taken as fact rather than opinion by this relatively sophisticated buyer is patently absurd. *Hayes Construction Company v Silverthorn*, 343 Mich 421, 426, 72 NW 2d 190 (1955) adopts the following concept from Judge Learned Hand:

> There are some kinds of talk which no sensible man takes seriously, and if he does, he suffers from his own credulity.

Michigan law has clearly established the criteria for fraudulent misrepresentation. As recited in *Papin v Demski*, 17 Mich App 151, 154, 155, 169 NW2d 351, 353 (1969),

> The general rule is that to constitute actionable fraud it must appear: (1) that defendant made a

material misrepresentation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance on it; and (6) that he thereby suffered injury.

Head v Benj. Rich Realty Company, 55 Mich App 348, 222 NW 2d 237 (1974), established that when a cause is based on alleged fraudulent misrepresentation inducing purchase, "plaintiff had the burden of proof to establish the essential elements of their cause of action." In the instant cause, Petitioner never established *any* of the recognized essential elements as required by Michigan law.

Uncontroverted testimony referred to earlier demonstrates that no misrepresentation was made — the roads were completed — (TR 82); the intention of Respondent was then and has been since to develop the island (TR 89, 92); Petitioner did not rely on statements made by Respondent (TR 114); and no testimony was ever introduced to show *any* damage to Petitioner, in fact, uncontroverted testimony clearly shows values have appreciated on the island. (TR 110)

Mention must be made of Petitioner's reliance on *Kefuss v Whitely*, 220 Mich 67, 189 NW 76 (1922) as an indication that statements of value can be relied on as fact. Petitioner has failed to understand that the result reached in *Kefuss, supra*, was due to bad faith on the part of defendant, and that no such bad faith exists in this case.

It is therefore clear from an examination of the transcript and of existing Michigan law that the trial judge accurately determined the facts as supported by the evidence, and accurately applied the law to them.

CONCLUSION

It is apparent that the trial judge made proper findings of fact and applied Michigan law correctly. There are no compelling or overriding reasons why this Court should grant Petitioner the relief requested. Respondent thus prays that this Honorable Court deny Petitioner a Writ of Certiorari to the Sixth Circuit Court of Appeals.

Respectfully submitted,

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